

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 3

A. M. ANDERSON, RECEIVER OF THE NATIONAL BANK
OF KENTUCKY, OF LOUISVILLE,

Petitioner.

v.

KATHERINE KIRKPATRICK ABBOTT,
ADMINISTRATRIX, ET AL.,

Respondents.

RESPONSE TO PETITION FOR REHEARING

ROBERT S. MARX,
FRANK E. WOOD,
EDWARD M. BROWN,
HARRY KASFIR,

Attorneys for Petitioner.

Of Counsel for Petitioner:

NICHOLS, WOOD, MARX & GINTER,

JOHN F. ANDERSON, Chief Counsel for the
Comptroller of the Currency.

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The petition for rehearing claims that the Court has misinterpreted certain facts. It argues that if these facts had been "correctly" stated the Court should have reached a different conclusion (p. 4). We respectfully differ with the argument and further submit that the facts are correctly stated in the opinion.

The first claim (p. 6) is that Banco Kentucky was not the "record owner of the bank stock." This is disingenuous. The bank stock certificates were issued in the name of Trustees. Banco was the registered holder of the "Trustees Participation Certificates." Respondents conceded that "The T. P. C.'s are *admittedly* bank stock for the purpose of this case" (Brief for Appellees, filed in Circuit Court of Appeals, p. 40). Each such trust certificate evi-

denced the record ownership of stock in two banks (National Bank of Kentucky and Louisville Trust Company). The bank and the trustees were each required by paragraph 6, of the Trust Agreement, to keep "a register of Trustees Participation Certificates issued by them similar to the ordinary stock certificate book." (Ex. 7, Vol. 1, p. 25.) The bank kept such stock register as its record of the "titular" holders of the bank stock. This record kept by the trustees and the bank showed that Banco Kentucky was the holder of record of approximately 95% of the bank stock represented by the trust certificates.

This point was previously argued in "Brief for Respondents," p. 57. The identical argument presented here was advanced in respondents' brief on reargument, p. 6. These arguments were fully met in our brown cover reply brief, pp. 22-26. This Court fully understood and correctly stated the facts. See Opinion, Footnote 2.

Respondents' reargument on election and *res judicata* is not new. It was carefully analyzed and disposed of in the Court's opinion. It was rejected by both the District Court and the Court of Appeals in the instant case. 23 F. Supp. 265, Conclusion of Law 13, R. 1, p. 268. It was also rejected by the District Court of Illinois, *Anderson v. Atkinson*, 22 F. Supp. 853.

It is next claimed (p. 8) that the Court erred in stating, in the opinion, that Banco was "negotiating" for Caldwell at the time of the failure. Respondents apparently claim that the Banco-Caldwell deal was consummated several months before the failure. If we were to assume that respondents were correct on this point, we submit that it does not affect the conclusion of the Court. However, respondents are one hundred per cent wrong in claiming that the Banco-Caldwell deal was consummated; and in criticizing the Court's statement that the deal was in process of negotiation at the time of failure. The District Court found as a fact that the Banco-Caldwell deal was not "con-

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summated," R. 1, p. 262. The Banco-Caldwell contract distinctly provided that the deal would *not* be consummated until an audit was made. No audit was ever made or even started. It is true that some Banco stock was issued to Caldwell when the contract was signed. Caldwell returned half of this stock before the failure. No dividends were ever paid on the stock that Caldwell retained. The evidence proves conclusively that the Caldwell deal was never consummated. The facts of the Caldwell deal are presented in our gray cover brief entitled "Supplemental Record References Re Caldwell."

The third point raised in respondents' brief on rehearing, p. 15, relates to the alleged secret mental processes of defendants with respect to the unperformed purposes of Banco which are directly disproved by the written statements referred to by the Court. Similar statements were also filed with the Louisville Stock Exchange, where most of the defendants reside. (Ex. 71, Vol. 4, p. 1695.)

The third point is not based on any alleged error of fact. It is the same argument previously advanced on pages 11 to 19 of respondents' "Supplemental Brief on Re-argument of the Case." Our reply thereto will be found in our white cover "Reply to Supplemental Brief," pp. 7-9, and in our gray cover "Supplemental Record References Re Caldwell," pp. 6-8.

Respectfully submitted,

ROBERT S. MARX,

FRANK E. WOOD,

EDWARD M. BROWN,

HARRY KASFIR,

Attorneys for Petitioner.

Of Counsel for Petitioner:

NICHOLS, WOOD, MARX & GINTER,

JOHN F. ANDERSON, Chief Counsel for the
Comptroller of the Currency.